Supreme Court, U.S.
FILED

No. 06-261 AUG 18 2006

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In The

Supreme Court of the United States

JO ANN FULTON,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY, WYOMING STATE BAR,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wyoming

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In acting by default on an amended complaint, is a state court's suspension of an attorney void as a denial of due process where the court never obtained Rule 15 jurisdiction after the attorney had answered the original complaint?

2. Is an attorney deprived of her right to substantive and procedural due process when a state court violates its own jurisdictional and notice requirements in suspending the attorney from practice?

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding are contained in the caption.

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is applicable to this petition.

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OPINION BELOW

The "Order Suspending Attorney from the Practice of Law" is reported at 133 P. 3d 514 (Wyo.2006). It is appended hereto at App. 1-App. 3. Also appended hereto, at App. 4-App. 17 is the "Report and Recommendation to the Wyoming Supreme Court" rendered by the Board of Professional Responsibility, Wyoming State Bar, which report is incorporated by reference in the Wyoming Supreme Court opinion. The exhibits appended to the said report are omitted.

JURISDICTION

The "Order Suspending Attorney from the Practice of Law" was entered by the Wyoming Supreme Court on April 20, 2006. The "Order Denying Petition for Rehearing" was entered by the Wyoming Supreme Court on June 6, 2006, and this petition for writ of *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner asserts that the order of suspension of the court below violates the Due Process of Clause of Amendment XIV, United States Constitution, Section 1, Clause 2: "nor shall any State deprive any person of . . . property without due process of law; . . . "

STATEMENT OF THE CASE

Petitioner ["Fulton"] is an attorney licensed to practice by the Supreme Court of Wyoming. In mid-2005, a disciplinary Complaint of five counts was filed against Fulton by the prosecutor for the Wyoming State Bar, initiating a proceeding before the Wyoming Board of Professional Responsibility ["BPR"] under the Wyoming Disciplinary Code ["Code"]. Fulton answered the disciplinary Complaint. A disciplinary hearing on the Complaint was scheduled to be conducted before the BPR. The hearing was vacated without hearing and without prior notice to Fulton.

In the time afforded by the postponement, an Amended Complaint was filed by the prosecutor without prior notice to Fulton, without hearing, and without leave of the BPR. The Amended Complaint was substantially identical to the original Complaint, plus two additional counts containing two minor offenses added to the five counts of the original Complaint, which had been answered by Fulton. Code Section 11(n) [App. 23] incorporates Rule 15, Wyoming Rules of Civil Procedure [App. 25]. Pursuant to Rule 15(a), as under the equivalent federal rule, after an answer has been filed a complaint may not be amended without leave of the BPR.

As required by Section 11(m) of the Code [App. 22], Fulton served her Answer by mail on December 7, 2005, addressed to both the prosecutor and the BPR at the same address, where they share the same administrative assistant. The mailing was evidenced by a certificate of service signed by Fulton in accordance with Wyoming rules, and by the postage meter date (not USPS postmark) shown on the envelope. The envelope, later received by the

BPR, was included in the BPR file forwarded to the Wyoming Supreme Court.

The prosecutor mailed notice of impending default to Fulton by certified mail on November 28, 2005. The certified mail was received by Fulton on December 13, 2005. Fulton was required to mail her answer within 20 days after the notice was sent – default is based on date of the mailing, not the receipt, of the notice. The prosecutor contended that Fulton's Answer was required to be filed by December 18, 2005, a Sunday. On December 20, 2005, the 22nd day after mailing of the notice and five business days after the notice was received, the BPR entered default on the Amended Complaint.

During the time allowed by the *ex parte* continuance, the prosecutor also filed a second complaint against Fulton on the unrelated charge of communicating directly to a couple whose attorney son claimed to be representing them. Fulton served her answer to the second compliant by mail on December 7, 2005, in the same envelope as the answer to the Amended Complaint. Default was entered on the 21st day after mailing the notice of default on the second complaint, at a time when the prosecutor understood Fulton had *not* received it, in that the certified return receipt was had not been returned.

Fulton moved to set aside the defaults. The Wyoming State Bar contended that Rule 15 did not apply to it and that Fulton had not mailed her answers as she had certified. Despite compelling legal authority in favor of setting aside a default under such circumstances, the BPR denied Fulton's motion to set aside the default and set a hearing on the imposition of discipline, consolidating the two cases. Fulton was permitted to appear at the equivalent of a

sentencing hearing, limited to the discipline to be recommended, not on the merits of the charges.

FEDERAL CONSTITUTIONAL QUESTIONS

Two constitutional questions are presented. First, whether Fulton was denied due process when the BPR – hence the Wyoming Supreme Court – never obtained jurisdiction. This question arises from the fact that the Amended Complaint on which Fulton was defaulted and suspended from practice was filed in violation of Rule 15 after Fulton had answered the original Complaint containing charges identical to those for which she was defaulted and suspended.

The second constitutional question is whether Fulton was deprived of due process where the disciplinary board had violated its own rules and procedures (a) in permitting a continuance by an *ex parte* communication – which permitted the filing of the Amended Complaint, and (b) by failing to provide Fulton notice of any basis for the amended charges on which default was entered.

With regard to the Rule 15 violation, the federal constitutional question was raised in Fulton's motion to the BPR to set aside the default, and by application to the Wyoming Supreme Court for rehearing, which was denied without findings or conclusions [App. 18].

REASONS FOR GRANTING THE WRIT

1. Departure from the Usual and Accepted Course of Judicial Proceedings.

The Supreme Court of Wyoming allowed its disciplinary board to violate its own rules and act without proper jurisdiction. The proceedings were so unusual, and so departed from the protection of rights required by the Constitution, that this Court should exercise its supervisory power over the state courts, as well as this Court's preeminent role in the supervision of attorney discipline, by allowing the writ sought herein.

2. An Amended Complaint Without Rule 15 Jurisdiction Denies Due Process.

Due process is denied where the requirements of Rule 15 are not met. *Nelson v. Adams USA, Inc.* 529 U.S. 460. The rules of civil procedure have substantive effect. They are not mere formalities, but have the force and effect of law and compliance is mandatory. *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) (Clark, J. dissenting); *Vanasse v. Ramsay*, 847 P.2d 993 (Wyo.1993); *Paxton Resources, L.L.C. v. Brannaman,* 95 P.3d 796 (Wyo.2004).

In a case involving an amended complaint to which a new party did not have a proper opportunity to be heard, this Court held that the rules of procedure define due process.

> The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees. . . . Rule 15 sets out the requirements for amended and supplemental pleadings. On that score, the Court of Appeals

> observed that as long as no undue prejudice is shown, "due process requirements are met if the requirements of Rule 15 are met." 175 F.3d, at 1349, n. 5. **But in the instant case, the requirements of Rule 15 were not met.**
>
> * * *
>
> This is not to say that Rule 15 is itself a constitutional requirement. Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet **permitted**, framed, and served.

Nelson v. Adams USA, Inc., 529 U.S. 460, 465-467 (2000) (emphasis supplied).

The *Nelson* case involved a civil judgment entered immediately after leave to amend against a new party who had full knowledge of the proceedings. A similar result is essentially what occurred here: The clear and explicit procedures required by Rule 15 were disregarded. In *Nelson*, the result was denial of an opportunity to respond and entry of judgment against the defendant without a hearing. In the case at bar, a quasi-criminal proceeding, the result was the more serious elimination of a previously filed answer, and conviction of the accused without a hearing. In both cases, the affected party was deprived of a right to contest the merits of the charges.

Like the federal courts, the Wyoming Supreme Court has held that the rules of civil procedure have substantive effect. They are not mere formalities. "Court rules have the force and effect of law." *Vanasse v. Ramsay*, 847 P.2d 993, 999 (Wyo.1993). Compliance with court rules is mandatory. *Paxton Resources, L.L.C. v. Brannaman*, 95 P.3d 796 (Wyo.2004).

In the BPR proceedings below, the prosecutor filed an Amended Complaint without motion, without notice to Fulton and without prior approval of the BPR. Suspension was imposed on Fulton by default on that Amended Complaint. The prosecutor justified violation of Rule 15 by declaring, *ipse dixit,* that Rule 15 did not apply.

The BPR report approved by the Wyoming Supreme Court was based on the default of the allegations in the Amended Complaint. Under Wyoming decisions on related matters, noncompliance with the rules is jurisdictional and cannot be cured by a trial court. *Paxton Resources, L.L.C. v. Brannaman,* 95 P.3d 796 (Wyo.2004). If that standard is applied to failure to comply with Rule 15, the Amended Complaint against Fulton was void and the BPR lacked jurisdiction to recommend suspension, and the Wyoming Supreme Court lacked jurisdiction to enter its order of suspension.

The BPR's disregard of Rule 15 also created a fatal contradiction. If Rule 15 did not apply – if it was not part of the Wyoming Disciplinary Code, then there was no provision in the Code by which a complaint could be amended at all. Within the Code there is no such thing as an "Amended Complaint." An amended complaint is an artifact of Rule 15 of the civil rules.

The suspension under those circumstances deprived Fulton of her right to the due process of law.

3. It is a denial of due process for a state court to violate its own notice requirements in suspending an attorney from practice.

a. *Fulton was not informed of the basis for the charges against her.* Discipline was imposed on Fulton for giving illegal tax advice [App. 12]. The details of the charge were not disclosed to her; she was informed of no IRC provision, statute or regulation she allegedly violated. The BPR concluded that Fulton had advised a client to avoid tax consequences. That is not a crime. Substantial parts of the legal and accounting professions are devoted to that endeavor.

b. *Evidence used against her was not provided.* On the basis of surreptitious tape recordings made without Fulton's knowledge and not provided to her, the BPR sanctioned Fulton for being incompetent, for counseling a client to commit a crime or fraud, for dishonesty, and for conduct prejudicial to the administration of justice [App. 12 & 16].

c. *The prosecutor communicated with the BPR, ex parte.* In order to obtain a continuance several days before the scheduled hearing on the original Complaint, the state bar's prosecutor communicated with the BPR, *ex parte*. The nature of the communication is revealing. The administrative assistant for the prosecutor also acts as the administrative assistant for the BPR. Apparently, the prosecutor did not have to communicate *ex parte* with any member of the BPR, because she had authority to act for the BPR herself, the ultimate *ex parte* communication. The order continuing the hearing thus was signed *ex parte* by the administrative assistant to the prosecutor, purportedly acting for the BPR.

It was only because of the delay created by the improper continuance that the prosecutor was able to proceed on an amended complaint. The Amended Complaint against Fulton was then filed without leave of the BPR seven days after the continuance was ordered. The delay also allowed the prosecutor to file a second Complaint on a petty new charge against Fulton. The new complaint was filed fourteen days after the continuance and was later consolidated into the same proceeding on the basis of the default.

d. *There was no default.* As required by the Code, Fulton mailed in a timely manner her answer to the Amended Complaint and her answer to the Complaint in the second matter. The mailing was shown by her certificate of service and the postage meter date on the envelope. The BPR determined that Fulton falsely claimed she served her answers. In her previously filed answer to the original Complaint, Fulton had answered the allegations of the Amended Complaint except as to minor charges set forth in two new causes of action. Thus, default was entered on a complaint which had been fully answered twice.

CONCLUSION

This Court should grant a writ of certiorari to review the faulty procedures of the Wyoming Supreme Court and its disciplinary board in taking from an attorney her professional career without according her the constitutional right to due process of law.

Respectfully submitted,

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IN THE SUPREME COURT, STATE OF WYOMING
2006 WY 51

April Term, A.D. 2006
April 20, 2006

BOARD OF PROFESSIONAL RESPONSIBILITY, WYOMING STATE BAR,	)	06 MISC 37
	)	***No. D-06-3***
Petitioner,	)	
	)	
v.	)	
	)	
JO ANN FULTON,	)	
	)	
Respondent.	)	

ORDER SUSPENDING ATTORNEY FROM THE PRACTICE OF LAW

This matter came before the Court upon a "Report and Recommendation to the Wyoming Supreme Court," filed herein March 17, 2006, by the Board of Professional Responsibility for the Wyoming State Bar. After a careful review of the Board of Professional Responsibility's Report and Recommendation, the materials attached thereto, "Respondent Fulton's Response to Report and Recommendation to the Wyoming Supreme Court," and the file, this Court finds that the Report and Recommendation should be approved, confirmed and adopted by the Court; and that the Respondent, Jo Ann Fulton, should be suspended form [sic] the practice of law for a period of three years. It is, therefore,

ADJUDGED AND ORDERED that the Board of Professional Responsibility's Report and Recommendation to the Wyoming Supreme Court, which is attached hereto and incorporated herein, shall be, and the same hereby is,

approved, confirmed, and adopted by this Court; and it is further

ADJUDGED AND ORDERED that, as a result of the conduct set forth in the Report and Recommendation, Respondent Jo Ann Fulton shall be, and hereby is, suspended from the practice of law for a period of three years from the date of this order; and it is further

ORDERED that Jo Ann Fulton shall reimburse the Wyoming State Bar the amount of $3,779.98, representing the costs incurred in handling this matter, as well as pay an administrative fee of $1,000.00, by paying the amount of $4,779.98 to the Clerk of the Board of Professional Responsibility, on or before August 1, 2006; and it is further

ORDERED that, pursuant to Rule 4(c) of the Disciplinary Code for the Wyoming State Bar, this Order Suspending Attorney from the Practice of Law, along with the incorporated Report and Recommendation, shall be published in the Wyoming Reporter and the Pacific Reporter; and it is further

ORDERED that the Clerk of this Court shall docket this Order Suspending Attorney from the Practice of Law, along with the Report and Recommendation, as a matter coming regularly before this Court as a public record; and it is further

ORDERED that the Clerk of this Court transmit a copy of this Order Suspending Attorney from the Practice of Law to the members of the Board of Professional Responsibility, and the clerks of the appropriate courts of the State of Wyoming.

DATED this 18th day of April, 2006.

BY THE COURT:

/s/ William U. Hill
WILLIAM U. HILL
Chief Justice

BEFORE THE BOARD OF PROFESSIONAL RESPONSIBILITY WYOMING STATE BAR STATE OF WYOMING

In the matter of	)	
JO ANN FULTON,	)	***Docket Nos.***
WSB Attorney No. 5-2686,	)	***2005-02 and 2005-29***
Respondent.	)	

REPORT AND RECOMMENDATION TO THE WYOMING SUPREME COURT

On February 28, 2006, a disciplinary hearing was held before the Wyoming State Bar Board of Professional Responsibility (hereafter the "Board") in the matter of Jo Ann Fulton, Docket Nos. #2005-02 and #2005-29. The Wyoming State Bar was represented by Bar Counsel, Rebecca A. Lewis, and Respondent Jo Ann Fulton represented herself. After hearing evidence and argument from both sides, the Board submits the following Report and Recommendation.[1]

PROCEDURAL HISTORY

In Docket No. 2005-02, an Amended Complaint was filed and served on Respondent on November 2, 2005. Pursuant to Rule 11(f) of the Disciplinary Code for the Wyoming State Bar (hereafter the "Disciplinary Code"), Respondent had twenty (20) days to serve an answer on Bar Counsel and the Board. Respondent failed to timely answer the Amended Complaint in Docket No. 2005-02.

[1] Board member Devon Coleman abstained from voting on these disciplinary recommendations.

On November 28, 2005, Bar Counsel filed and served a Motion For Entry of An Order of Default, together with a Notice of Imminent Default on Amended Complaint. Respondent did not timely respond to the Notice of Imminent Default, and on December 20, 2005, the Board issued its Entry of Order of Default and Order Setting Hearing on Sanctions in Docket No. 2005-02.

In Docket No. 2005-29, a Complaint was filed and served on Respondent on November 15, 2005. Pursuant to Rule 11(f) of the Disciplinary Code, Respondent had twenty (20) days to serve an answer on Bar Counsel and the Board. Respondent failed to timely answer the Complaint in Docket No. 2005-29. On December 6, 2005, Bar Counsel filed and served a Motion For Entry of An Order of Default together with a Notice of Imminent Default on Disciplinary Summons and Complaint. Respondent did not timely respond [sic] the Notice of Imminent Default, and on December 27, 2005, the Board issued its Entry of Order of Default and Order Setting Hearing on Sanctions in Docket No. 2005-29.

On January 10, 2006, the Chair of the Board, acting as a disciplinary judge pursuant to Rule 11(g) of the Disciplinary Code, held a pre-hearing conference. At the conference, Respondent requested leave to file a motion to set aside the default orders in both Docket No. 2005-02 and Docket No. 2005-29, and on January 10, 2006, the Board issued its Order Continuing Hearing in which the disciplinary hearings set for January 18 and 19, 2006 were continued, and further ordered that Respondent's motion for relief pursuant to Rule 60 of the Wyoming Rules of Civil Procedure be filed no later than January 20, 2006. Respondent's Rule 60(b) Motion For Relief From Entry of

Default was untimely filed on January 24, 2006. Notwithstanding the untimely filing, Respondent's Motion was considered by the Board, and arguments by Respondent and Bar Counsel were heard by the Board on February 10, 2006.

The Board found that the default orders entered in Docket Nos. 2005-02 and 2005-29 were properly entered pursuant to Rule 11(m) of the Disciplinary Code. It therefore became Respondent's burden to prove that relief from the default orders was warranted under Rule 60 of the Wyoming Rules of Civil Procedure, made applicable to these proceedings pursuant to Rule 11(n) of the Disciplinary Code. Under Rule 60, a litigant may seek relief from judgments and orders attributable to (a) clerical mistakes, or (b) other reasons. In this matter, Respondent seeks relief from the default orders pursuant to Rule 60(b)(1), which authorizes relief, upon such terms as are just, when the entry of the order was occasioned by "mistake, inadvertence, surprise or excusable neglect." Under applicable Wyoming law, a Rule 60(b)(1) motion must clearly be substantiated by adequate proof, and the burden is on the movant to bring himself within the rule. *Vanesse v. Ramsey,* 847 P.2d 993 (Wyo.1993); *United States Aviation, Inc. v. Wyoming Avionics, Inc.,* 664 P.2d 121 (Wyo.1983).

The Board found that Respondent failed to carry her burden to prove that she was entitled to relief from the orders of default entered in Docket No. 2005-02 and Docket No. 2005-29. Specifically, the Board found that Respondent failed to carry her burden to prove that her failure to timely respond to the underlying disciplinary complaints, and more importantly, the notices of imminent default, were the result of mistake, inadvertence, surprise or excusable neglect. Therefore the Motion was denied and

the matters went to hearing on February 28, 2006, to determine the form of discipline to be imposed.

FINDINGS OF FACT ON #2005-02

1. Respondent, Jo Ann Fulton, is an attorney who has been licensed to practice law in Wyoming since 1990. Her office is located in Laramie, Wyoming.

2. Respondent represented Terry and Casi Rummel in regard to personal injuries Casi Rummel received in a vehicle accident. The Representation Agreement provided at paragraph V. "Expenses," that paralegal fees were to be billed to and paid by Rummels as an "expense." This is a variation from the form contingency fee agreement approved by the Wyoming Supreme Court in Rule 6 of the Rules Governing Contingency Fees for Members of the Wyoming State Bar, and affected substantive rights of the Rummels. Respondent did not have this modification of the form approved by the District Court of the Second Judicial District, as required by Rule 6.

3. Respondent did not provide to Rummels a copy of the Rules Governing Contingency Fees for Members of the Wyoming State Bar, as required by Rule 5(e) of those Rules.

4. Some, if not all, of the paralegal fees that were billed should have been included as part of the contingency fee as they were actions which are generally understood to be part of the legal services to be compensated by the contingency fee.

5. Although the Representation Agreement indicated that the "adverse parties" were "G.E. Property & Casualty Insurance Co.," Respondent was also pursing legal matters

in regard to Farm Bureau and the Town of Saratoga for which she sought a fee.

6. Respondent and Rummels settled some claims for a total of $101,864.00. Most of that money was received in November 2003. Inasmuch as Respondent was planning to file suit for Rummels against the Town of Saratoga, Respondent and Rummels agreed that Respondent would retain the funds for that possible litigation. Respondent was unsure what amount of expenses would be incurred in that suit, but did not expect that suit to use all the settlement funds from the settlement.

7. In the course of the discussion regarding retention of the settlement monies, Respondent erroneously advised Rummels that if Respondent kept the money, the interest earned would be part of the settlement such that it would not be taxable.

8. On 16 February 2004, Respondent purchased a Certificate of Deposit ("CD") from U.S. Bank with the Rummels' settlement monies. The CD was in the amount of $101,864.00 and matured in 2 years. The CD was purchased in the name of Fulton Law Office, P.C., and not in the name of Terry or Casi Rummel. The CD also included the tax I.D. number for Respondent, not Rummels. No interest from this CD was paid to the Wyoming Bar Foundation as it would have been if the CD had been part of Respondent's IOLTA trust account.

9. Respondent informed Rummels of the purchase of the CD, but did not provide them with any of the documentation even after Rummels requested it on numerous occasions. Respondent did not inform Rummels that the CD had been purchased in the name of Fulton Law Office

firm. Respondent also did not inform them that it had a 2 year term.

10. Although the settlement monies were put in the CD rather than distributed to Rummels, allegedly for the purpose of funding the suit against the Town of Saratoga, Respondent did not file that suit until 16 December 2004. The basis of the suit was essentially that the Town of Saratoga owed a duty to Casi Rummel to issue a citation to the person with whom she had the vehicle accident, and that Casi Rummel was somehow injured or damaged as a result of the Town's failure to issue such a citation. This suit was frivolous and totally without merit, as even a small amount of legal research would have revealed.

11. In response to the suit, the attorney for the Town of Saratoga served a Wyoming Rules of Civil Procedure Rule 11 notice, then filed a motion to dismiss. The suit was dismissed in early 2005 after Rummels contacted Attorney Matthew Castano to negotiate the dismissal of the suit without Rule 11 sanctions.

12. In late 2004, it was agreed that $25,000 of the settlement funds would be released to the Rummels by Respondent.

13. Near the end of 2004, Rummells requested the balance of the settlement funds. Rummels had told Respondent that they were in significant need of this money as they had a bank note coming due. After a number of unexplained delays by Respondent, she finally provided two checks payable from the "Fulton Law Office, PC" operating account, for $25,000 and $20,312.12, respectively. When Rummels attempted to cash the checks, the checks were returned for insufficient funds. The money

was eventually paid by Respondent in the form of cashier's checks.

14. Before the settlement monies were distributed, Respondent counseled Rummels in regard to how to pay out the settlement monies in a way that Respondent contended would avoid tax consequences for the interest the monies had earned while held by Respondent. That advice included paying out the monies in several smaller amounts, which is what was done, and paying the monies to persons other than Rummels.

15. In addition to the settlement payout, Respondent paid $20,000 to Rummels as settlement of a dispute between Rummels and Respondent over Respondent's legal fees.

FINDINGS OF FACT ON #2005-29

1. Jo Ann Fulton is an attorney licensed to practice law in Wyoming since 1990. Her office is located in Laramie, Wyoming.

2. On 9 May 2005, Myra Schwartz of Laramie, Wyoming, called her son, Ryan Schwartz, an attorney in Cheyenne, Wyoming, regarding a possible problem with the sale of their home. Specifically, Myra informed Ryan that Respondent had contacted the Schwartzs' realtor about a potential lawsuit by the Schwartzs' neighbors regarding the noise level of their air conditioner.

3. During that call, Myra entered into an attorney-client relationship with Ryan Schwartz to represent she and her husband, Jay Schwartz, in the dispute with the neighbors and to protect their interests while they attempted to sell the property.

4. Ryan Schwartz then called the Schwartzs' realtor, Patti MacMillan to confirm what Myra had told him, which she did.

5. Ryan Schwartz thereafter called Respondent on 9 May 2005. During the call, Ryan introduced himself as an attorney and informed Respondent that he represented the Schwartzes with respect to the air conditioner dispute.

6. Ryan Schwartz and Respondent discussed the merits of the case, and Ryan stated that the Schwartzes felt Respondent's clients' claims were unfounded.

7. The conversation ended with Ryan Schwartz explaining that the Schwartzes would not be taking any action regarding Respondent's clients' complaints, and that Respondent should contact Ryan Schwartz with any other questions.

8. Ryan Schwartz never gave Respondent permission to contact the Schwartzes directly.

9. By letter of 8 September 2005, Respondent contacted the Schwartzes directly. The letter was not copied to Ryan Schwartz.

CONCLUSIONS OF LAW IN #2005-02

1. Respondent violated Rule of Professional Conduct 1.5(a) by including paralegal time for legal services which should be generally covered by the contingency percentage.

2. Respondent violated Rule 1.5 by violating Rules 5(e) and 6 of the Rules Governing Contingency Fees for Members of the Wyoming State Bar in that Respondent did not provide Rummels with a copy of those Rules, the

Representation Agreement did not comply with the form agreement in Rule 6, and Respondent did not seek approval for the modification of the form agreement.

3. By filing a suit against the Town of Saratoga which had no merit, Respondent violated Rules 1.1 and 3.1.

4. By telling Rummels that the interest on the settlement funds was not taxable if Respondent kept those funds, Respondent violated Rule 1.1.

5. By purchasing the Certificate of Deposit in the name of her law firm instead of her clients' names, Respondent violated Rule 1.15(a) because she did not keep those funds separate from her own but essentially took them as her own.

6. Respondent violated Rule 1.15(c) by delivering a portion of their funds to them with two checks which were returned for insufficient funds.

7. Respondent violated Rules 1.15 and 1.4 by failing to respond to Rummels' requests for information regarding the purchase of the certificate of deposit.

8. Respondent violated Rules 1.2(d), 8.4(c) and 8.4(d) by counseling Rummels regarding how to unlawfully avoid tax consequences of interest earned from the settlement monies.

CONCLUSIONS OF LAW IN #2005-29

1. Respondent violated Rule of Professional Conduct 4.2 by communicating with Schwartzes directly about the dispute over the air conditioner when Respondent knew that attorney Ryan Schwartz represented them and when

Ryan Schwartz had not given Respondent permission for that communication and there is no law which authorized that communication.

AGGRAVATING FACTORS FOR #2005-02 AND #2005-29

The ABA Standards for Imposing Lawyer Sanctions, Standard 9.22, lists factors which may be considered in aggravation in determining what sanction to impose or recommend. The following are the aggravating factors which were supported by the evidence:

9.22(a) – prior disciplinary offenses. Respondent has a significant history of prior discipline. To summarize, in 2002, Respondent received a Private Reprimand from the Board of Professional Responsibility for violations of Rules 3.1 and 4.4 in regard to asserting a non-meritorious claim. By Order of 23 July 2003, the 10th Circuit suspended Respondent from practice before that Court as the culmination of a number of disciplines it had issued to her. The Wyoming Supreme Court, based on that suspension by the 10th Circuit, issued a public censure to Respondent on 6 January 2004. Attached hereto as part of this Report and Recommendation are Exhibits 13, 14, 15, and 18 which are the actual disciplinary orders which were very persuasive in the Board's recommendations.

9.22(c) – a pattern of misconduct. Respondent continues to breach the same types of rules in #2005-02 as she did in regard to her prior disciplinary matters.

9.22(d) – multiple offenses. In regard to #2005-02 and #2005-29, Respondent violated a number of the Wyoming Rules of Professional Conduct. This shows either a lack of

knowledge of her ethical obligations or a consistent disregard of them or both.

9.22(e) – bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Respondent initially failed to timely answer the Amended Complaint in #2005-02 and the Complaint in #2005-29. After the defaults were entered, and Respondent was sent notice of them, she did nothing until the pre-hearing conference on 10 January 2006 which preceded the hearing which was set to begin on 18 January 2006. At that time, she made an oral request for time to file a motion to set aside the defaults. She represented to the Board Chair, Joe Teig, that she needed at least 10 days to prepare the motion and get the necessary affidavits to support the motion. Therefore, the hearing on these matters was continued for about 6 weeks to allow Respondent time to file her motion, for the Bar to respond, and for the entire Board to consider the motion. The motion, however, was not timely filed, and there were no affidavits filed. Additional facts in support of this aggravating factor are set forth in more detail in the Bar's Opposition to Respondent's Rule 60(b) Motion for Relief from Entry of Default, filed on 30 January 2006.

9.22(f) – submission of false evidence, false statements or other deceptive practices during the disciplinary process. Respondent testified under oath to several matters that were contradicted by tape recorded telephone conversations between Rummels and Respondent. Those tapes were admitted into evidence as Exhibit 17.

9.22(g) – refusal to acknowledge wrongful nature of conduct. At the hearing on these matters, Respondent did not take full responsibility for or acknowledge her wrongful

conduct. To the contrary, she sought to blame her staff for issuing the settlement checks on the wrong account which resulted in them being returned for insufficient funds. She sought to blame the bank for the manner in which the CD was issued. She sought to blame her mishandling and commingling of the trust account monies on Bar Counsel for not recommending a CLE she could take on trust accounts after Respondent's trust account was overdrawn through an error in her office back in June 2004. She sought to blame Rummels for how the settlement monies were handled and distributed.

9.22(h) – vulnerability of victim. Rummels were very vulnerable. They were unsophisticated consumers of legal services and trusted Respondent to provide a fair and proper representation agreement and to properly purchase a CD which was secure and which fit their needs. She did neither. In addition, based on Respondent's recommendations, Respondent filed a frivolous suit against the Town of Saratoga while holding Rummels' settlement money for more than 11 months for the purported purpose of paying expenses of a suit that had no merit.

9.22(i) – substantial experience in the practice of law. Respondent has been practicing law since 1990.

RECOMMENDATIONS FOR #2005-02 AND #2005-29

The ABA Standards for Attorney Sanctions, Standard 7.2, applies to violations of Rule 1.5 and states that "suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system."

ABA Standard 4.12 applies to violations of 1.15 and states that "suspension if generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."

The comment to that Standard states in pertinent part, "Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own or fail to remit client funds promptly."

The comment also says, "Because lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss."

ABA Standard 5.11(b) states that "disbarment is generally appropriate when a lawyer engages in any other intentional conduct (other than those listed in subsection a) involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

ABA Standard 4.42 states that "suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."

Given the findings of fact and conclusions of law detailed above, along with the ABA Standards for Attorney Sanctions, the Board hereby recommends that the Wyoming Supreme Court order the following:

a. Respondent be suspended from the practice of law for a period of three years from the date of the Court's Order;

b. Respondent be ordered to pay the costs of prosecution and hearing these two matters in the amount of $3,779.98, no later than 1 August 2006; and

c. Respondent be ordered to pay the administrative fee for both cases in the amount of $1000.00 no later than 1 August 2006.

Dated March 15, 2006

/s/ Joe M. Teig
Joe M. Teig, Chair

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this ~~Opposition~~ Report & Recommendation was mailed by United States Mail, postage prepaid, on March 17, 2006 to the following:

Jo Ann Fulton
P.O. Box 1267
Laramie, WY 82073-1267

/s/ Sandy J. Inniss
Sandy J. Inniss

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 2006

BOARD OF PROFESSIONAL RESPONSIBILITY, WYOMING STATE BAR, Petitioner, v. JO ANN FULTON, Respondent.	)	No. D-06-3

ORDER DENYING APPLICATION FOR REHEARING/RECONSIDERATION

(Filed June 6, 2006)

This matter came before the Court upon Jo Ann Fulton's application for rehearing in which she asks that we reconsider our order of April 20, 2006. The Court has carefully considered that application and the accompanying brief, as well as the Court's file in this matter. The Court concludes that the application should be denied. It is therefore,

ORDERED that the above-described application be, and hereby is, denied.

DATED this 6th day of June 2006.

BY THE COURT:

/s/ William U. Hill
WILLIAM U. HILL
Chief Justice

DISCIPLINARY CODE FOR THE WYOMING STATE BAR

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 2003

In the Matter of)
Complete Revision to the)
Disciplinary Code for the)
Wyoming State Bar)

ORDER ADOPTING REVISED DISCIPLINARY CODE FOR THE WYOMING STATE BAR

The Wyoming State Bar having recommended to the Court complete revision of the Disciplinary Code for the Wyoming State Bar, attached hereto; and the Court having examined the proposed revisions and deeming the revisions advisable; it is,

ORDERED that effective November 1, 2003, Rules I through XXVI (inclusive) of the present Disciplinary Code for the Wyoming State Bar shall be withdrawn; and it is further

ORDERED that the revised Disciplinary Code for the Wyoming State Bar, attached hereto, be, and hereby is, adopted by the Court to be effective November 1, 2003; and it is further

ORDERED that the Disciplinary Code for the Wyoming State Bar, attached hereto, shall be published in the advance sheets of the Pacific Reporter, the Wyoming Reporter, and in the Wyoming Court Rules; and that the Disciplinary Code for the Wyoming State Bar shall thereupon be spread at length upon the journal of the Court.

Dated this 10 day of July, 2003.

BY THE COURT:

William U. Hill
Chief Justice

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11. Pre-hearing procedures.

(a) Upon receiving a complaint or information from any source stating a prima facie violation of the Rules of Professional Conduct, Bar Counsel may open a file and conduct an investigation into the allegations of the complaint. The decision not to open a file is not appealable.

(b) If the investigation discloses that there is no clear and convincing evidence of a violation of the Rules of Professional Conduct, Bar Counsel may dismiss the complaint. Bar counsel shall then serve a notice of dismissal upon the complainant and inform the complainant of the right to seek review of the dismissal by the Panel. Review by the Panel shall be limited to the issue of abuse of discretion.

(c) If the investigation discloses facts which Bar Counsel believes may prove by clear and convincing evidence a violation of a provision of the Rules of Professional Conduct, Bar Counsel and respondent may stipulate to a form of discipline pursuant to Section 16 or to a diversion program pursuant to Section 14. The BPR shall approve or disapprove any stipulation for private discipline or diversion program and issue an order thereon. Any stipulation for public discipline shall be approved or disapproved by the BPR and, if approved, recommended to the Court. The Court shall act on the recommendation, as it deems appropriate.

(d) If Bar Counsel and respondent cannot agree on a stipulated form of discipline or diversion, Bar Counsel may present the matter to the Panel for a determination of probable cause, justifying the filing of a formal charge.

(e) Service on a respondent is complete upon mailing by certified mail, return receipt requested, a copy of the formal charge to the respondent's last known address as shown in the records of the Wyoming State Bar.

(f) After a formal charge is served on respondent, respondent shall have twenty (20) days to serve an answer on the BPR and Bar Counsel.

(g) The BPR or Disciplinary Judge, if one is assigned, may conduct a scheduling conference or other prehearing conference for purposes of managing the action and shall issue an order on such conferences which shall govern the proceeding and the hearing.

(h) All documents required to be served in a disciplinary proceeding, except interrogatories, requests for production and requests for admissions and their responses, shall be filed with the BPR at the address of the Wyoming State Bar offices and served upon all other parties.

(i) Subpoenas may be issued in accordance with the procedure of Rule 45 of the Wyoming Rules of Civil Procedure. In the event a subpoena is not obeyed without adequate excuse pursuant to Rule 45(e) of the Wyoming Rules of Civil Procedure, Bar Counsel or respondent may apply to the Disciplinary Judge, the member of BPR exercising the powers of a Disciplinary Judge, or the district court in the judicial district where the person disobeying the subpoena resides for an order requiring

such person to obey the subpoena. The Disciplinary Judge, member of BPR exercising the powers of a Disciplinary Judge, or the district court shall issue such order. Any failure to obey the order may be punished as civil contempt.

(j) Subpoena fees, witness fees, and mileage costs, shall be the same as those for proceedings in the state district courts.

(k) Disputes concerning discovery shall be determined by the Disciplinary Judge, if one has been assigned, or member of the BPR exercising the powers of a Disciplinary Judge. All discovery orders are interlocutory and may not be appealed prior to the entry of a final order.

(l) Non-dispositive pre-hearing motions shall be determined by the Disciplinary Judge, if one has been appointed, or by a member of the BPR exercising the powers of a Disciplinary Judge.

(m) If the respondent fails to answer the formal charge within twenty (20) days or other time period as stipulated with Bar Counsel or ordered by the BPR, Bar Counsel may file a motion for entry of an order of default. Bar Counsel shall serve copies of the motion on the respondent, together with a notice that default will be entered if the respondent fails to answer the complaint within twenty (20) days after service of the notice on the respondent. If the respondent fails to respond to the notice of default and answer the formal charge within the time allowed, the BPR shall enter default. The BPR shall then hold a hearing to inquire into the appropriate form of discipline. No order shall be entered or recommendation made to the Court without the BPR being satisfied that there is a factual basis for the violation and for imposition

of the form of discipline. Respondent may only be heard by the BPR regarding the form of discipline to be imposed. The BPR may then order private discipline or it may make a recommendation to the Court for public discipline.

(n) Rules 5, 6, 7, 8, 10, 11, 15, 16, 26, 29, 30, 32, 33, 34, 35, 36, 37, 42, 45, 46, 56, 58, 60, and 61 of the Wyoming Rules of Civil Procedure shall apply to disciplinary proceedings so far as the provisions in those rules are in their natures applicable and consistent with these rules.

WYOMING RULES OF CIVIL PROCEDURE

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1991

In the Matter of the Adoption of the Revised Wyoming Rules of Civil Procedure

ORDER ADOPTING THE REVISED WYOMING RULES OF CIVIL PROCEDURE

The members of the Permanent Rules Advisory Committee-Civil Division having conducted research, conferred among themselves on numerous occasions and conferred with the court; having presented to the court a copy of proposed Revised Wyoming Rules of Civil Procedure, which have been approved by the court with some modifications, and as modified and approved are filed with this order; and based upon the submission and recommendation of the advisory committee and approval of the court; it is therefore

ORDERED by this court that the Revised Wyoming Rules of Civil Procedure, attached hereto, be hereby adopted; that said rules be published in the advance sheets of the Pacific Reporter and in the Wyoming Reporter; that said rules shall become effective 60 days after publication in the advance sheets of the Pacific Reporter, shall be spread at length upon the journal of this court and shall thereupon supersede the current Wyoming Rules of Civil Procedure. It is further

ORDERED that the members of the Permanent Rules Advisory Committee-Civil Division consisting of G.G.

"Greg" Greenlee, Chairman, Richard M. Davis, Jr., Nancy G. Hinckley, Richard H. Honaker, Honorable Larry L. Lehman, George Santini, Honorable William A. Taylor, and Joel Selig, Recorder, be commended for the excellence of their work and that sincere appreciation be extended to each member.

Dated this 20th day of December, 1991.

BY THE COURT:

William Urbigkit
Chief Justice

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* – A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* – When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause

them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* – An amendment of a pleading relates back to the date of the original pleading when:

(1) Relation back is permitted by the law that provides the statute of limitations applicable to the action; or

(2) The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or

(3) The amendment changes the party or the naming of the party against whom a claim is asserted if the forgoing provision (2) is satisfied and, within 120 days after the filing of the complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) *Supplemental pleadings.* – Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(Amended July 13, 1964, effective October 11, 1964; amended October 22. 1992, effective January 12, 1993.)